

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	.	Criminal No. 1:13cr419
	.	
vs.	.	Alexandria, Virginia
	.	January 24, 2014
MARK STUART LANDERSMAN,	.	9:56 a.m.
also known as Mark Stuart,	.	
	.	
Defendant.	.	
	.	
.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:	MORRIS R. PARKER, JR., AUSA
	PATRICIA M. HAYNES, AUSA
	KAREN L. TAYLOR, AUSA
	United States Attorney's Office
	2100 Jamieson Avenue
	Alexandria, VA 22314

FOR THE DEFENDANT:	JOHN K. ZWERLING, ESQ.
	CARY J. CITRONBERG, ESQ.
	The Law Offices of John Kenneth
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	Alexandria, VA 22314

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

(Defendant not present.)

THE CLERK: Criminal Case 13-419, United States of America v. Mark Stuart Landersman. Would counsel please note their appearances for the record.

MR. PARKER: Good morning, Your Honor. Morris Parker, Patricia Haynes, and Karen Taylor for the United States.

THE COURT: Good morning.

MR. ZWERLING: Good morning, Your Honor. John Zwerling and Cary Citronberg for Mr. Landersman.

THE COURT: All right, Ms. Taylor, this is your motion.

MR. ZWERLING: Your Honor, is this part of the *Farmers* hearing?

THE COURT: I'm sorry?

MR. ZWERLING: Is this part of the *Farmers* hearing?

THE COURT: Not really. We're not going to get into any details today.

MS. TAYLOR: Yes, Your Honor. My motion is essentially that the Court's order to hand over 150,000 to the defense is not based on an official finding that there is no probable cause for the seizure of the funds, and until the Court makes that determination, the government contends it's just not appropriate to be giving them 150,000 at this point.

1 THE COURT: Of course, you know, if I make that
2 finding, then you're going to have to turn it all over. I was
3 trying to compromise on this one. This case is getting murkier
4 and murkier.

5 I should tell you first of all I've spoken to
6 Judge O'Grady, and we have decided it makes sense for one judge
7 to be hearing everything, so he is transferring the civil
8 forfeiture case to this Court. I will be hearing everything.
9 There's too much overlap, and if we do have to get special
10 clearances for some of this case, if that happens, it makes
11 sense to just have one chambers and one set of law clerks
12 getting that clearance.

13 So that's what's going to happen. There'll be an
14 order rearranging that assignment sometime within the next
15 couple of days, but I wanted you to know that because you had
16 pointed out that there's technically a civil proceeding going
17 on.

18 I'm just about prepared now based upon what I have
19 seen to find that the probable cause in this case, had a
20 judicial officer of this court been apprised of all the
21 information that has come to the Court, and you may not even
22 know it all, from defense counsel, that there'd be enough
23 questions that a court would not have felt comfortable issuing
24 the warrants that were issued.

25 If you want me to make that finding, I will. I've

1 held off doing that, giving again what I think is a fair and
2 appropriate balance of the equities here, because what the
3 defense has done, they have dug up some very interesting and
4 concerning issues that affect this case. At the end of the
5 day, it may not make a difference, but it certainly is enough
6 legitimate noise that it gives the Court great concern.

7 And again, the issue here is these funds are not
8 going to the defendant; they're going to counsel. I've made
9 that clear to, you know, Mr. Parker and his team, and I've made
10 it clear to you, and so that's -- and I've also denied a
11 previous motion to stay, and this is somewhat repetitive, but,
12 I mean, if you want to come in and try to start really
13 addressing the probable cause, I'm prepared to have that
14 hearing sometime next week, but there are problems with holding
15 that hearing because not everybody has access to all the
16 information.

17 MS. TAYLOR: Correct, Your Honor. Yes, we -- if Your
18 Honor wants to revisit the probable cause, certainly. We just
19 want to be allowed the opportunity to put on our evidence to
20 show that there is probable cause for this indictment, and
21 until we get an opportunity to do that, we just feel that it's
22 improper to release the funds at this point in time.

23 THE COURT: Let me ask -- Mr. Parker, I'm going to
24 ask you -- and, Ms. Haynes, I address Mr. Parker because he's
25 closest to the lectern.

1 MS. HAYNES: That's fine.

2 THE COURT: If you want to be the one answering, feel
3 free to jump up and do it.

4 The defense have represented in their papers -- and I
5 want to make sure I understand this correctly -- that they are
6 under the impression that the equipment involved in this case
7 has all been destroyed. Is that correct or not?

8 MR. PARKER: Well, Your Honor, if I may, there have
9 been a number of assertions in pleadings based on -- I don't
10 know who these individuals are, much of which we contend is not
11 true, that have been made under seal, and we were questioned
12 about it in court, and they appear in a newspaper, and some of
13 this is classified, and quite frankly, this assertion, this
14 most recent -- I take it the Court is --

15 THE COURT: Well, I'm concerned if evidence has been
16 destroyed, that creates a real problem especially in a fraud
17 case, because part of any fraud analysis in my view would be
18 was the -- were the items which the government paid for what
19 they purported to be. I think I've asked you this before.

20 Now, my understanding was that these devices, these
21 silencers or whatever they are, suppressors, were delivered to
22 a government warehouse. They were produced and delivered. Do
23 they do what they were supposed to do?

24 MR. PARKER: Your Honor, no one asked for them.
25 That's our, that's our contention. The only people -- and

1 again, I don't want to get into too much detail, we can
2 approach the bench if the Court would prefer, and I would
3 prefer that we approach the bench, because again, the last
4 time, there was no reporter in the courtroom, but yet half the
5 proceeding is in the newspaper, and some of it does pertain to
6 classified information. So --

7 THE COURT: But, you know, I mean, when you-all went
8 to bring this case to the grand jury, I mean, somebody in the
9 investigative service should have alerted you that this thing
10 was potentially going to have material that had to be handled
11 differently. I've not seen a case like this before where a
12 case was indicted and it turns out there was all sorts of
13 things percolating around it that the prosecutor, the line
14 prosecutors didn't know about.

15 Again, I'm not blaming you or Ms. Haynes. I think
16 that it strikes the Court that you-all were not given the
17 complete picture of the environment of this case.

18 MR. PARKER: We had no idea what individuals who were
19 fired from the Department of Navy might say to other
20 individuals regarding some of this information. Again, as I
21 have stated, at least with respect to one of those individuals,
22 we made several attempts to talk to that person, and we finally
23 did after the case was charged, but they resisted. For
24 whatever reason, we were unable to talk to them.

25 So we could not have anticipated some of the things

1 that have been brought up, and even in the most recent
2 pleadings, we could not have anticipated. I would not have
3 anticipated --

4 THE COURT: Well, maybe not you but the
5 investigators, the ones on the ground. As you know, the most
6 recent pleading is very serious in terms of --

7 MR. PARKER: Well, it is, but again, these are
8 programs to which some of these investigators didn't even have
9 access. We had to be read into these programs, so even that
10 investigator could not have anticipated.

11 And, and our response to that is, quite frankly, we
12 believe that's really, the relevance is borderline.

13 THE COURT: Well, the problem I have, too, is you-all
14 want this *Farmer* hearing, another *Farmer* hearing, and I'm
15 perfectly willing to have a full-blown hearing, a much more
16 in-depth hearing than we had last time, but no one's in a
17 position yet to do it. These attorneys haven't been cleared,
18 Ms. Taylor hasn't been cleared, and, you know, again, this is a
19 continuing delay of this case.

20 Mr. Landersman -- the defendant, Mr. Landersman, is,
21 you know, under a felony -- felony charges, and the government
22 has taken a significant amount of resources, and at the present
23 time, the only issue before the Court today is whether or not
24 it would be appropriate for a portion of those funds to be
25 released, and as I said, in the old days, I know that this was

1 often done that when the government seized funds from a target
2 or a defendant, there were compromises made that some of those
3 funds were released to counsel. That certainly has been done
4 in the past, and this case in my view calls out for that more
5 and more because of the problems that are associated and that
6 have been brought to attention, frankly, by work of the
7 defense.

8 MR. PARKER: Well, if I may say and I'll turn it over
9 to Ms. Taylor, those were -- those are representations made in
10 pleadings or through -- it wasn't in the context of a hearing,
11 and I will defer to Ms. Taylor.

12 MS. TAYLOR: Oh, I was just going to point out a lot
13 of the times if it's substitute assets, we will do that, but
14 this is direct proceeds, and with direct proceeds, we look at
15 it differently. We can't even agree to give over direct
16 proceeds without getting permission from the Department of
17 Justice to do that, which is usually not forthcoming if it's
18 direct proceeds.

19 THE COURT: Has your office even approached the
20 people at Justice and given them some idea of the kinds of
21 information the defense has been digging up and presenting to
22 the Court?

23 MS. TAYLOR: No, we have not talked about what kind
24 of information they've been digging up, but again, they
25 haven't -- from what I've seen, and again, I'm not here on

1 every hearing, I don't know that they've actually presented
2 actual evidence. They have, they have said it may be out
3 there, but there's no actual evidence that they've presented
4 that would actually undermine the probable cause, we submit,
5 Your Honor.

6 THE COURT: Well, I think this -- we're going to
7 probably have a trial before a trial in this case, but that
8 might be it, but again, how long is it going to take to get
9 people in a position where they can get access to the
10 information they need to have access to?

11 MR. PARKER: Well, Your Honor, at the last hearing, I
12 represented it would take some time, and I think it was the
13 Court who said it takes no more than one to two weeks. I took
14 issue with the Court's statement again because I didn't think
15 that was a realistic time frame.

16 I have given the names of defense counsel and other
17 counsel who we believe are involved in providing information to
18 defense counsel to Ms. Gunning. I can ask Ms. Gunning --
19 again, I think Ms. Gunning's been in touch with the Court.

20 THE COURT: Well, I know the process has started.

21 MR. PARKER: And I'll ask Ms. Gunning for a time
22 frame, but --

23 THE COURT: Well, the other issue I want addressed is
24 is there an ATF agent who is the lead investigator on this
25 case?

1 MR. PARKER: Yes, Your Honor.

2 THE COURT: Who is that?

3 MR. PARKER: Rick -- Richard Dean. I get the two --
4 there are two Richards in this case.

5 THE COURT: The issue raised in the most recent
6 pleading by the defense about the potential conflict of
7 interest between the investigative agencies does concern the
8 Court and, I think, ought to at least create some concern on
9 the part of the prosecutors to make sure that the agency that's
10 investigating this case doesn't have any axe to grind or is not
11 itself vulnerable to those types of charges.

12 Is there any reason why the ATF cannot be made the
13 prime agency on this case and get the other agency out of it?

14 MR. PARKER: It would be a problem, Your Honor,
15 because I think the, the NCIS has much of the access to the
16 programs, etc., that are being discussed in the context of this
17 case.

18 THE COURT: Well, I understand that, but the agent,
19 the ATF agent could be read in.

20 MR. PARKER: Possibly, Your Honor. That will take
21 additional time. That process will take additional time.

22 Moreover, we think that that's a baseless accusation.
23 We've heard that accusation, and that was raised in the context
24 of the badges. That has little, if anything, to do with the
25 silencers issue.

1 THE COURT: All right. Let me hear from defense on
2 this. Mr. Citronberg or Mr. Zwerling, who's going to respond?

3 MR. ZWERLING: Your Honor, it's my understanding that
4 the government has already made arrangements with whoever needs
5 to have arrangements made for the monies to be released and
6 wired into our account as early as today.

7 THE COURT: I'm sorry?

8 MR. ZWERLING: That the government has made
9 arrangements for the funds to be wired into our account already
10 because the Court had given it a deadline of today, so whatever
11 permission apparently they needed to get they got. If I'm
12 mistaken, Ms. Taylor can correct me, but that's the information
13 that we were given. We had to provide the wiring information
14 and things like that.

15 THE COURT: All right.

16 MR. ZWERLING: We were told it would be there today.
17 So I think their needing to go to DOJ or whatever was either
18 bypassed or dealt with and --

19 THE COURT: Ms. Taylor, have a seat until
20 Mr. Zwerling finishes.

21 MR. ZWERLING: So I may be wrong, but that was the
22 impression that I was given. That's why we gave the wiring
23 instructions, because otherwise, they have -- if they haven't
24 made that, then they have just ignored your order to have it
25 paid today in anticipating your granting a motion to

1 reconsider, which is a pretty unusual thing.

2 THE COURT: Unwise.

3 MR. ZWERLING: So I'm assuming that they're ready to
4 be in compliance with the Court's order.

5 The -- I know if we proceed with the *Farmer* hearing
6 and we prevail, that all of the funds will be released because
7 that is what would be required. Our client would certainly
8 like to see that.

9 We're concerned about how much work we still have to
10 do in order to do a full *Farmer's* hearing in preparation for
11 what they're going to put on, whether we're going to be able to
12 be given access in a timely fashion to all of the information,
13 but we have evidence that we can put on to support our motions.
14 We chose to go lightly on some of that stuff because there was
15 no need to mention people's names if it wasn't necessary, but
16 there are -- you know, we would want the documentation
17 regarding the conflict of interest. There's got to be
18 documentation that we referred to in our pleading. The
19 government would have to get that for us.

20 I don't know if they made the attempt to get it,
21 whether they were told those things don't exist, they were told
22 NCIS wasn't deprived of any funds or didn't have their budget
23 reduced. We don't think that's correct, but maybe that's the
24 information they're working on.

25 We're in the dark, but we, we think that under *Franks*

1 v. *Delaware*, there was material information that was not
2 provided to the magistrate by the government. The government
3 is charged with the knowledge -- the prosecutors are charged
4 with the knowledge of their agents. Their agents, for example,
5 had interviewed Shellenbarger, had interviewed Mr. Vaughan a
6 long time ago.

7 That information clearly was exculpatory, clearly
8 undercut a lot of the conclusory things in the complaint and in
9 the indictment that would make it seem as though no one had
10 ever heard of this, it was solely three people in the Navy
11 Department who concocted this thing and ordered these things.

12 There were discussions. They're documented. They
13 are -- and they were reported to the investigators months
14 before the indictment.

15 And so it's hard for us to understand how the
16 government can say we're totally off base in all of our
17 allegations. I haven't seen a pleading filed by the government
18 that said we -- they deny at this point that there was a type
19 of program that we mentioned in our submissions that certain
20 types of weapons for which these suppressors were specifically
21 made for didn't exist as part of this program, nor that they
22 weren't destroyed subsequent to the litigation in this case,
23 and the revelation in *The Post* on November 12 that the
24 suppressors were going to a specific outfit that would clearly
25 be likely to need anonymity in their weaponry, that's never

1 been denied in recent days since we started filing our
2 information.

3 It's never been denied that somebody acknowledged
4 that the color of the money was correct in this thing, that --
5 I've seen no documentation or statement of any witness saying
6 that the information that Lee Hall gave to the government is
7 not correct, that the, the notes that he wrote regarding the
8 estimate from another company through a middleman of what it
9 would cost to do these suppressors was twice what was paid for
10 to my client for making those items, and in fact, it appears as
11 though the government has acknowledged that that was -- oh,
12 that was just a middleman, but that confirms that there would
13 have been some type of documentation or notes of Mr. Hall that
14 have been destroyed.

15 There's no denial that, that's evidence that NCIA or
16 the Navy security people came in and destroyed documentation
17 regarding the acquisition of these items. They have since, we
18 allege, destroyed the weaponry for which the suppressors were
19 designed.

20 MR. PARKER: Your Honor, I would object. These are
21 under seal filings. Now we're going into a totally different
22 area, and again, this is classified information.

23 THE COURT: All right. Well, all right, I think at
24 this point, what we need to do is this: Ms. Taylor, is it
25 correct that you requested from Mr. Zwerling their wire

1 information?

2 MS. TAYLOR: Yes, Your Honor. We did not want to be
3 held in content of court by not having the money today, because
4 the Court's order was to have it today is my understanding.

5 THE COURT: All right.

6 MS. TAYLOR: And so to be on the safe side, I would
7 have liked to have come to court with a check, but the marshals
8 said they don't do that anymore, they wanted to wire transfer
9 it, and so they had to have Mr. Citronberg fill out a form for
10 that, which I sent him on Tuesday and they did that, and so
11 they said it takes two business days once they get the form to
12 wire.

13 So that is in process. I don't know if I can just
14 call it off or not, but I just know it's in process.

15 THE COURT: All right. Well, I'm going to do this:
16 I'm not changing my order. I already denied this stay
17 previously, and so the order stays in effect, so the monies
18 will be transferred to defense counsel today.

19 I'm going to let the government sit back and think
20 more seriously as to whether you really want a *Farmer* hearing
21 in this case. If so, we still have this problem because the
22 line prosecutors can't participate in that unless, quite
23 frankly, you-all are prepared to have them. It would probably
24 be a more seamless proceeding if they do. Quite frankly,
25 you're putting out so much of this case ahead of time anyway,

1 I'm not, you know, I'm not convinced that the prosecutors being
2 aware of that information is going to be a detriment to your
3 ability to defend the case, but you've got to think that one
4 through.

5 So both sides should think about the cost/benefit
6 analysis of going forward with the *Farmer* hearing and/or --
7 yeah, anyway. But the problem, the logistical problem is we
8 can't have a meaningful hearing without the necessary
9 clearances going through, and that is a concern that I have. I
10 know that Ms. Gunning's office is working vigorously to get
11 that done, but it hasn't yet been done, and I think until we
12 have a sense of how long that's going to take, it's almost
13 meaningless to put this on the calendar.

14 So at this point, there's some relief to defense
15 counsel in that you're getting some funding for the work you've
16 been doing on this case, and the main concern I have, though,
17 and I am going to ask Mr. Parker and Ms. Haynes to look into
18 this, I want to know absolutely whether the evidence, the
19 physical evidence, that is, these items that were -- that are
20 at issue in the indictment, has been destroyed or if, in fact,
21 there would still be at least one physical to come to court if
22 we have this trial that can be either evaluated by an expert,
23 and I just don't know. The impression I've had is that they
24 may not still exist.

25 MR. PARKER: No, Your Honor, I think there's a

1 misunderstanding. I don't think they're contending that any of
2 the items made and seized in this case were destroyed. Their
3 contention goes to --

4 THE COURT: Other things.

5 MR. PARKER: Exactly. There's no contention and they
6 have not been destroyed.

7 THE COURT: All right. But then are you assuring me
8 that they, in fact, still exist?

9 MR. PARKER: Absolutely not, Your Honor.

10 MR. ZWERLING: Your Honor, we have seen them.

11 THE COURT: Oh, you have seen them.

12 MR. ZWERLING: We've been allowed to go and look at
13 them.

14 THE COURT: Oh, all right.

15 MR. ZWERLING: And I apologize if I gave the Court
16 the impression that the suppressors were destroyed. That was
17 never our intent.

18 THE COURT: Okay. That's good. We've clarified
19 that.

20 All right, so I'm denying the -- I'm not denying the
21 motion for a *Farmer* hearing. I'm saying both sides should
22 think about whether that really makes sense. If both sides are
23 interested in going forward with it, then we have to get the
24 necessary evidence lined up, and I expect this will be a
25 significantly long proceeding, so once we know when it can be

1 done, then we'll put it on the calendar.

2 MR. ZWERLING: Thank you, Your Honor.

3 THE COURT: I have to leave it like that.

4 And I think for speedy trial purposes, again, this
5 case is sufficiently complex that the continuation of any trial
6 date at this point is appropriate, all right? Anything
7 further?

8 MR. PARKER: No.

9 MR. CITRONBERG: May I?

10 THE COURT: Mr. Citronberg.

11 MR. CITRONBERG: Two very brief things. One, at the
12 last hearing, the government had indicated that -- or the Court
13 had raised concerns about much of the Shellenbarger ROI being
14 redacted, and the government had represented that they would
15 like to be able to hand that over in its entirety to us. We
16 haven't gotten one yet. I just wanted to --

17 THE COURT: I thought you had -- we have one now.

18 MR. PARKER: We do have one, Your Honor. I said that
19 we may very well turn it over. I did give the Court an
20 unredacted one for the Court to review. I have not turned it
21 over to counsel. I don't know if there's anything exculpatory.
22 I'll look at it again and consult with Mr. --

23 THE COURT: Citronberg?

24 MR. PARKER: -- Citronberg today.

25 THE COURT: All right, if you're not planning to turn

1 over the unredacted, you need to explain to the Court why.

2 MR. PARKER: Okay. Certainly, Your Honor.

3 THE COURT: All right?

4 MR. CITRONBERG: And then the, the other issue is
5 with respect to the conflict of interest motion, that again, we
6 aren't asking the Court to rule on any issues in that except
7 that ask the government not to destroy any of the evidence that
8 would be related to that motion. We had a proposed order, and
9 there's been so much destroyed in this case, we're just very
10 nervous about that type of documentation being destroyed as
11 well.

12 THE COURT: I am -- if it hasn't been done clearly
13 enough, I will include again in today's order that there can be
14 no destruction of any documents, e-mails, or any evidence
15 related in any respect to the issues in this case, which
16 include the defendant's allegations of there being some
17 conflict between the Naval Investigative Services and other
18 entities in the Department of the Navy.

19 MR. CITRONBERG: Thank you, Your Honor.

20 THE COURT: All right? That's all it's going to say.

21 And then it's your job, Mr. Parker and Ms. Haynes, to
22 get that information to the Navy so that no one says, "Well, we
23 didn't know about it." All right?

24 MR. PARKER: Yes.

25 THE COURT: All right, thank you. You're all free to

1 go.

2 (Which were all the proceedings
3 had at this time.)

4
5 CERTIFICATE OF THE REPORTER

6 I certify that the foregoing is a correct transcript of
7 the record of proceedings in the above-entitled matter.

8
9
10 /s/

11 _____
12 Anneliese J. Thomson
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